Dynasteel Corporation *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Case 26–CA–20558

December 19, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 14, 2003, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel and the Union each filed an answering brief to Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings[1] and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

Dynasteel Corporation (the Respondent) operates a steel fabrication business out of three facilities: in Millington, Tennessee (near Memphis), Natchez and Iuka, Mississippi. In July 2001, employees became concerned about an increase in insurance premiums and a policy change requiring them to purchase their own supplies and safety equipment. These changes gave rise to an interest in union representation among the employees. The two members of the maintenance department at the Iuka facility, Eddy Goss and Dee Vaughn, spearheaded the union effort at that facility. In September 2001, with the encouragement of the other employees, Vaughn contacted the Steelworkers, and Goss contacted the Boilermakers (the Union). Thereafter, Vaughn collected names of employees who were interested in the Union. In early October, Boilermakers representative, Barry Edwards, met with some of the Iuka employees, including Goss, at a store near the plant.

II. SUPERVISORY STATUS OF EDDY GOSS

Eddy Goss was hired by the Respondent on March 19, 2001, as a fitter and welder, and was placed in the maintenance department within a couple of months. As stated above, he was one of two regular employees in the maintenance department at the Iuka facility, along with Dee Vaughn.[2] According to Goss' testimony, both he and Vaughn were responsible for servicing, inspecting, and repairing equipment. They were also responsible for inventorying and ordering supplies and signing tools out to employees who wished to use them.

We agree with the judge's finding that Goss was not a statutory supervisor. First, contrary to the argument made by the Respondent, it is settled that the burden of proving that an individual is a supervisor is on the party alleging that supervisory status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–712 (2001). The Respondent has not met that burden.

Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152 (11).

None of these primary indicia of supervisory status has been established in Goss' case. The incident in which Goss was unlawfully compelled to sign disciplinary warnings against Barnes and Vaughn does not show supervisory status. There was no evidence that Goss had the authority to hire, fire, transfer, or discipline employees. Further, the credited testimony indicates that any direction given by Goss to other employees was routine and did not require the exercise of independent judgment. In another case, the Board has found a maintenance person with duties similar to Goss not to be a statutory supervisor. See *Lincoln Park Nursing Home*, 318 NLRB 1160, 1162 (1995) (holding that a maintenance person who gave two employees routine assignments, had some input into employee evaluations, and was paid at a higher rate than the other two employees in the department did not possess the independent judgment necessary to be a statutory supervisor). Accordingly, we adopt the judge's finding that Goss was not a supervisor.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 1083 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We shall modify the judge's recommended Order in accordance with our decisions in *Ferguson Electric Co.,* 335 NLRB 142 (2001), and *Indian Hills Care Center*, 321 NLRB 144 (1996).

[2] A third employee, Tim Barnes, was assigned to the maintenance department several weeks before Goss' discharge. Barnes was a welder who had been injured and was assigned to light maintenance duty while he recuperated.

[3] Although the Respondent cites several possible secondary indicia of supervisory status, these are insufficient to establish supervisory status in the absence of any primary indicia. *Stanford Hotel*, 344 NLRB 558, 567 (2005).

III. THE 8(A)(1) AND (3) VIOLATIONS[4]

We adopt the judge's findings regarding the alleged violations of Section 8(a)(1) and (3), except as follows.[5]

A. We do not adopt the judge's finding that the Respondent's discipline of Tim Barnes violated Section 8(a)(3) of the Act. Contrary to the judge and our dissenting colleague, we do not find that the elements of a discriminatory discipline case have been met with regard to Barnes. There was no evidence presented that Barnes engaged in any union activity prior to his discipline. Barnes' only established union activity was the union meeting he attended with Vaughn, which occurred subsequent to his discipline. The General Counsel has not met his threshold burden to prove that Barnes' discipline was unlawful; therefore, we cannot find that it was.

Our dissenting colleague also asserts that our finding that the Respondent unlawfully compelled Goss to sign the disciplinary warning against Barnes necessitates a finding that the discipline was unlawful. We disagree. The fact that Goss was unlawfully compelled to discipline Barnes does not establish that the discipline itself was unlawful. The Respondent's unlawful motive was to make it appear that Goss was a supervisor, not to punish Barnes for any protected activity. Concededly, but for the instruction to Goss, there would have been no discipline of Barnes. However, causality is not the same thing as motive.[6]

B. We also do not adopt the judge's finding that the General Counsel and Human Resources Director Jack Melvin's failure to disavow remarks by the Respondent's secretary, Glenna Basham, violated Section 8(a)(1) of the Act. On October 15, after they had been discharged, employees Goss and Vaughn returned to the Iuka facility wearing union buttons and met with secretary Glenna Basham in the reception area. Goss asked Basham whether Plant Manager Mark Jones had talked to Vice President Creasy. Basham asked, "About bringing you back?" Goss said yes. Basham then said, "Not with those stickers on," apparently referring to the union buttons Goss and Vaughn were wearing. The conversation continued until Melvin, who had come out of a nearby office area, told Goss he could not discuss the Union on the property, and told Goss and Vaughn to leave.[7] Goss asked Melvin why he and Vaughn had been discharged, and Melvin said he could not remember. After a brief discussion, Goss and Vaughn left.

The judge found that Basham was not a supervisor or agent of the Respondent. Nevertheless, the judge found that Melvin's failure to disavow Basham's statements that Vaughn and Goss would not be returned to work due to their union "stickers" violated Section 8(a)(1).

We agree with the judge's conclusion that Basham was not an agent of the Respondent. We disagree with the judge, however, that Melvin was under a duty to disavow Basham's statement. We do so because the General Counsel did not establish that Melvin heard it. Although Goss testified that Melvin was nearby throughout the conversation, the evidence did not provide a reasonable basis for concluding that Melvin heard this particular statement. For this reason, we find that this allegation has not been established.

C. We find that the remarks made by Shop Foreman Harris to Vaughn in September 2001 violated Section 8(a)(1).[8] According to Vaughn's uncontradicted testimony, he had spoken with a representative of the Steelworkers, who encouraged him to collect names of employees who were interested in union representation. Over a 2-day period, Vaughn had solicited 80–90 percent of the employees, before and after work and during lunch, and had created a list of names. Significantly, Harris was aware of these facts. In the incident at issue, Harris told Vaughn that a temporary worker from Memphis had inquired about Vaughn's creation of a list of

[4] We do not reach the issue of the alleged threat of futility made by Jack Melvin to union organizers at the Millington facility, because finding a violation would be cumulative of other violations of this type found by the judge and affirmed in this Decision.

[5] Member Schaumber would remand the following issues to the judge for an explanation of his credibility resolutions in determining whether the Respondent violated Sec. 8(a)(1): (1) whether Plant Manager Mark Jones threatened employee Eddy Goss during the summer of 2001; (2) whether Jones and Supervisor Bill Sanders threatened Goss in August 2001; (3) whether Shop Foreman Glen Adcock threatened employees in September 2001; (4) whether Jones threatened employees in September 2001; (5) whether Sanders threatened Goss is September 2001; and (6) whether Jones interrogated Goss in October 2001 following his discharge. The judge summarily credited testimony regarding these issues without explaining why he discredited the Respondent's witnesses, who denied making the alleged threats. Therefore, Member Schaumber finds that the judge's credibility resolutions lack sufficient detail to provide an adequate basis for review.

[6] Member Liebman, contrary to the majority, would find that Barnes was unlawfully disciplined. Barnes' discipline was issued (as was Vaughn's) solely because the Respondent compelled Goss to issue these disciplines. The majority rightly acknowledges that "Goss was unlawfully compelled to sign disciplinary warnings against Barnes and Vaughn." In Member Liebman's view, that conclusion necessarily establishes that the warning was unlawful. The Respondent compelled Goss to discipline Barnes (and Vaughn) not only to create the appearance that Goss was a supervisor, as the majority states, but also for the purpose of interfering with Goss' union activities. Cf. *Rainbow News 12*, 316 NLRB 52, 67 (1995) (unlawful motivation established where employer "takes adverse action against a group of employees . . . in retaliation for the protected activity of some"). The evidence here does not demonstrate that Barnes would have been disciplined regardless of the Respondent's unlawful compulsion of Goss.

[7] Melvin's remarks were not alleged as violations of the Act.

[8] We correct the judge's statement that Harris denied making the threat. In fact, Harris did not testify at the hearing.

employees' names. Harris informed Vaughn that he had told the temporary worker that Vaughn was collecting a list of tools. Harris told Vaughn not to let anyone know that Vaughn was taking names and why he was taking them. Harris then said that if the temporary worker found out what Vaughn was really doing, the temporary worker would call Vice President Creasy, and Vaughn would be fired.

We find this to be a clear threat of retaliation for Vaughn's union activity in violation of Section 8(a)(1).[9]

IV. REFUSAL TO HIRE/CONSIDER FOR HIRE

The Respondent ran ads in a Memphis newspaper on November 2 and 8, 2001, stating that it had immediate openings for welders and structural fitters. After seeing one of the ads, union organizer Barry Edwards telephoned the Respondent's Millington facility. He told the Respondent's receptionist that he had 30 years of experience in welding, rigging, and fitting; the receptionist told him to bring in his resume. Edwards then contacted two union members, Ronald Fuqua and Jeff Pearson. Fuqua had about 15 years' experience as a welder and fitter, while Pearson had 2 years' experience in boilermaking and 5 years' experience in welding. All three men completed resumes, identifying themselves as union organizers, and Edwards took the resumes to Respondent's facility on November 5. Edwards gave the resumes to Respondent's president, Harold Trusty, and told him that he was a welder, rigger, and fitter with over 30 years of experience. He also told Trusty that he had the resumes of two others, and asked him if they needed to fill out applications. Trusty told him the resumes would suffice. Trusty also told Edwards that he would see that the resumes got to the right person, and that if the applicants had the right talents, the Respondent would contact them. The next day, Trusty gave the resumes to Melvin. None of the applicants was ever contacted by the Respondent.

On December 5, union member Tony Churchill attempted to apply for work while wearing a shirt bearing union insignia. Melvin did not ask what job Churchill was seeking or what his experience was, but simply told him that the Respondent was not hiring. He did not offer Churchill an application or offer to give him a welding test. Melvin testified that he does not hire during the month of December because of a seasonal slowdown. Melvin also testified that he weld tests every applicant for employment, regardless of whether he has any openings.

The Respondent's records show that it accepted 29 applications during the month of November. Nine of these applicants passed the weld test, and seven of them were hired. Four of the seven individuals who were hired applied after Edwards, Fuqua, and Pearson. On December 10 and 11, the Respondent accepted applications from three additional job applicants. The Respondent's records show that it hired laborers during the month of December.

We find that the Respondent violated the Act by failing to hire Edwards, Fuqua, and Pearson, and by failing to consider Churchill.[10] We agree that the General Counsel established the elements of a refusal-to-hire case regarding the first three applicants, namely:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

FES, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

The Respondent was advertising for welders and fitters at the time, and hired at least six individuals on or after November 5, the date Edwards, Fuqua, and Pearson applied. All three had welding experience, and all indicated on their resumes that they were union members seeking to organize the Respondent. The Respondent's numerous 8(a)(1) violations provide evidence of its antiunion animus.

We also find that the Respondent unlawfully refused to consider Churchill for hire. To prove a refusal-to-

[9] Chairman Battista concludes that Vaughn would reasonably understand that Harris was trying to protect him. However, Vaughn would also reasonably infer from Harris' remark that Vice President Creasy would fire Vaughn if he learned of Vaughn's union activity. Although Vaughn would understand that Harris would seek to prevent Creasy from learning of Vaughn's union activity, Vaughn would reasonably fear that Creasy would learn this from other sources and would then fire Vaughn. Thus, Harris' remarks would chill Vaughn's union activity. On this basis, Chairman Battista concurs with his colleagues.

[10] We reject the Respondent's argument that these four individuals were not bona fide applicants for employment because they did not fill out application forms or take welding tests. Although we do not dispute that the Respondent's hiring process required applicants to do these two things, Trusty told Edwards that the resumes were sufficient, and did not tell him that testing was necessary. Rather, he told Edwards that the resumes he had given him would suffice, and made no mention of a welding test. Regarding Churchill, as noted below, he was turned away without being told anything about the Respondent's hiring process. See *PNEU Electric*, 332 NLRB 616, 616–617 (2000), enfd. in relevant part 309 F.3d 843 (5th Cir. 2002) (employer departed from its normal hiring process and "affirmatively misled" job applicants by telling them that no applications were available).

consider violation, the General Counsel must show that the Respondent excluded the applicants from a hiring process, and that the Respondent was motivated by anti-union animus. *FES*, 331 NLRB at 15. Churchill was excluded from the Respondent's hiring process: he was not given the opportunity to submit a resume or application. Rather, he was immediately rebuffed by the Respondent without even being asked what type of position he wished to apply for. Upon seeing his union shirt, the Respondent refused to consider him for employment of any kind. As the Respondent has not put forward any credible reason for refusing to consider him for hire, we conclude that the Respondent's exclusion of him from the hiring process was motivated by antiunion animus. We therefore find that the Respondent's refusal to hire Edwards, Fuqua, and Pearson, and its refusal to consider Churchill for hire, violated Section 8(a)(3) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Dynasteel Corporation, Millington, Tennessee, Iuka and Natchez, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with plant closure, loss of jobs, discharge, or unspecified reprisals if they vote to be represented by, or otherwise support, the Union.

(b) Threatening its employees that support of the Union is futile.

(c) Engaging in surveillance of its employees' union activities.

(d) Interrogating its employees concerning their union sympathies or the union sympathies of their coworkers.

(e) Instructing its employees to commit unfair labor practices or threatening them with discipline if they refuse to commit unfair labor practices.

(f) Disciplining, discharging, or otherwise discriminating against its employees in retaliation for their union or other protected activities.

(g) Failing or refusing to hire or to consider applicants for hire because of their union affiliation or its belief or suspicion that they may engage in union activities once they are hired.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unlawful discharges of Eddie Goss and Dee Vaughn and offer them full reinstatement to their former jobs or if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, rescind and remove from its files the unlawful disciplinary warning issued to Dee Vaughn, and the unlawful warning placed in Eddie Goss' personnel file.

(c) Within 14 days from the date of this Order, offer Barry Edwards, Jeff Pearson, and Ronald Fuqua instatement to the positions for which they applied. If those positions no longer exist, offer them employment in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

(d) Consider Tony Churchill for future employment, in accordance with nondiscriminatory criteria, and notify him, the Union, and the Regional Director for Region 26 in writing of future openings in positions for which Churchill would have applied, or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for the failure to consider him, the Respondent would have selected Churchill for any job openings arising after the beginning of the hearing on October 15, 2002, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall hire him for any such position and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of the judge's decision and Order.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire and consider for hire the above-named discriminatees and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(f) Make whole Eddie Goss, Dee Vaughn, Barry Edwards, Jeff Pearson, and Ronald Fuqua for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

(g) Within 14 days from the date of this Order, expunge from its files any references to the discharges of Eddy Goss and Dee Vaughn, and, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used as a basis for future personnel actions against them.

(h) Within 14 days from the date of this Order, expunge from its files any references to discipline given Dee Vaughn and Eddie Goss in October 2001, and, within 3 days thereafter, notify them in writing that this has been done and that their discipline will not be used as a basis for future personnel actions against them.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"[11] at its facilities in Millington, Tennessee, Iuka, Mississippi, and Natchez, Mississippi. Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2001.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with plant closure, loss of jobs, discharge, or unspecified reprisals if they vote to be represented by, or otherwise support, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, or any other union.

WE WILL NOT threaten our employees that support of the Union is futile.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT interrogate our employees concerning their union sympathies or the union sympathies of their coworkers.

WE WILL NOT instruct our employees to commit unfair labor practices or threaten them with discipline if they refuse to commit unfair labor practices.

WE WILL NOT discipline, discharge, or otherwise discriminate against our employees in retaliation for their union or other protected activities.

WE WILL NOT fail or refuse to hire or to consider applicants for hire because of their union affiliation or our belief or suspicion that they may engage in union activities once they are hired.

WE WILL NOT, in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful discharges of Eddie Goss and Dee Vaughn and offer them full reinstatement to their former jobs or if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, rescind and remove from our files the unlawful disciplinary warning issued to Dee Vaughn, and the unlawful warning placed in Eddie Goss' personnel file.

WE WILL, within 14 days from the date of the Board's Order, offer Barry Edwards, Jeff Pearson, and Ronald Fuqua instatement to the positions for which they applied. If those positions no longer exist, we will offer them employment in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

WE WILL make whole Eddie Goss, Dee Vaughn, Barry Edwards, Jeff Pearson, and Ronald Fuqua for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's order, expunge from our files any references to the discharges of Eddy Goss and Dee Vaughn and, WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used as a basis for future personnel actions against them.

WE WILL, within 14 days from the date of the Board's order, expunge from our files any references to discipline given Dee Vaughn and Eddie Goss in October 2001, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discipline will not be used as a basis for future personnel actions against them.

WE WILL consider Tony Churchill for future employment, in accordance with nondiscriminatory criteria, and notify him, the Union, and the Regional Director for Region 26 in writing of future openings in positions for which Churchill would have applied, or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for the failure to consider him, we would have selected Churchill for any other job openings, we will hire him for any such position and make him whole for any loss of earnings and other benefits, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire and consider for hire the above-named discriminatees and, WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

DYNASTEEL CORPORATION

Dean Owens, Esq., for the General Counsel.
Wilson Eaton, Esq., for the Respondent.
Michael T. Manley, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on October 15, 16, and 17, 2002, in Corinth, Mississippi. The complaint as amended at the hearing was issued by the Regional Director for Region 26 of the National Labor Relations Board (the Board) based on charges brought by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO (the Charging Party or the Union) and alleges that Dynasteel Corporation (the Respondent or the Company or Dynasteel) has engaged in and is engaging in violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent has by its answer denied the commission of any violations of the Act.

On the entire record, including testimony of the witnesses and the exhibits received in evidence and after review of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all times material during the 12-month period ending July 31, 2002, it has been a corporation, engaged in the production of steel fabricated products with offices and places of business at the following locations:

(a) Near Millington, Tennessee (the Millington facility).

(b) Near Iuka, Mississippi (the Iuka facility).

The Respondent in conducting its business operations set out above during the aforesaid period has:

(a) Purchased and received at its Millington, Tennessee facility, goods valued in excess of $50,000 directly from points outside the State of Tennessee.

(b) Sold and shipped from its Millington, Tennessee facility goods and materials valued in excess of $50,000 directly to points outside the State of Tennessee.

(c) Purchased and received at its Iuka, Mississippi facility, goods valued in excess of $50,000 directly from points outside the State of Mississippi.

(d) Sold and shipped from its Iuka, Mississippi facility goods and materials valued in excess of $50,000 directly to points outside the State of Mississippi.

At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent denies, and I find on the basis of the record evidence that at all times material herein, the Union has represented employees with respect to their hours, wages, and terms and conditions of employment and has been a labor organization within the meaning of Section 2(5) of the Act.

Statement of Facts[1]

The Iuka Facility

Respondent operates a steel fabrication business which involves both structural steel and plate fabrication production. It operates three plant facilities, which are located in Millington, Tennessee (the main office also referred to as the Memphis facility), Natchez and Iuka, Mississippi. It opened its Millington operation around 1970, its Natchez facility in the late 1980s, and its Iuka facility in March 2001. By July, the Iuka facility consisted of two buildings about a quarter of a mile apart. The port building was a large open shop. The main building contained a large production shop, a small maintenance shop, office area, and a kitchen.

Mark Jones was the plant manager of the Iuka facility. Glen Adcock was the shop foreman of the main building and Anthony (Dickey) Harris was the shop foreman of the port build-

[1] The following includes a composite of the credited testimony at the hearing. All dates are in 2001, unless otherwise stated.

ing. Respondent admitted in its answer that Jones and Adcock are 2(11) supervisors. Following an amendment to the complaint by the General Counsel, Respondent's counsel admitted that Harris was a 2(11) supervisor from September to November 2001. Adcock and Harris had similar responsibilities. Each was in charge of their respective building and employees. There was a welder foreman and a fitter foreman in each building who worked directly under each shop foreman. Plant Manager Jones, Shop Foreman Adcock, and Shipping/Receiving Supervisor Sanders each had a private office in the main building. Vice President Murray Creasy used the conference room in the main building as an office when he was at the Iuka facility. Secretary Glenna Basham was located in the open reception area in the office. By October, there were about 60 to 70 employees working in the main building and about 20 to 30 employees working in the port building. Most of the employees were fitters and welders. There was also a two-man maintenance department consisting of employees Eddy Goss and Dee Vaughn. Goss was hired March 19, as a fitter and welder and within a couple of months was placed in maintenance until his discharge on October 3. Vaughn was hired directly into maintenance in mid-July until his discharge on October 11. Tim Barnes was a welder who had been injured and returned to work on light duty to recuperate in the maintenance shop a couple of weeks before Goss was discharged on October 3. On light duty, Barnes was to clean up as needed and to do simple repairs of tools that were tagged for repair. The maintenance department performed repairs and maintenance of large machinery throughout both buildings and received small tools in the maintenance department for maintenance or repairs in the shop. One of three company vehicles, a pickup truck, was assigned to the maintenance department as they were required to travel to and from the main building and the port building in servicing and fueling and repairing large machinery. It is undisputed that prior to October 2001, neither Goss nor Vaughn had ever been disciplined. Shop Foreman Adcock who supervised the maintenance department testified that Goss had natural maintenance ability, was very highly qualified and very capable of handling a lot of situations. Vaughn was less experienced but Adcock testified that both were on their way to being outstanding.

The 8(a)(1) and (3) Violations

In July, employees became concerned about an increase in the insurance premiums they must pay and a policy change requiring them to purchase their own supplies and safety equipment. These changes gave rise to an interest in union representation among the employees.

Goss testified that in the summer he and Plant Manager Jones were riding in Goss' four-wheel drive truck and that he talked of his former employer in the Iuka area, where there was a union at the plant. Jones told him that Dynasteel was owned by a private individual who would "shut the doors and fire everybody before he'll let a union come in." At the hearing, Jones denied having made this statement. I credit Goss' testimony and find that this was a threat of plant closure and discharge if the employees engaged in union activities and that Respondent thereby violated Section 8(a)(1) of the Act.

Wesley Watson, a former employee of Respondent who worked as a fitter and welder from June to October 16, testified that he initially worked at the main building for about a month and a half and was then moved to the port building. Shortly before this move, he and a number of employees were gathered on a pad outside the main building and Shop Foreman Adcock told the group that they (the Company) would "shut Dynasteel down if the Union came in." Adcock denied at the hearing that he had made this statement. I credit Watson and find that this threat of plant closure was violative of Section 8(a)(1) of the Act.

Goss testified that about 6 weeks prior to his termination early one morning before clocking in, he was discussing the Union with Sanders, Jesse Lambert, Jones, and another employee. Goss was telling them that was the only way to go and Jones said, "Eddy, I done told you there wouldn't be no union come in here." Jones then, "turned and walked off." Sanders then put his arm around Goss and said, "Eddy, if they ever try to start a Union in here, you'll be the first one fired." Goss' testimony was corroborated in part by former employee Jesse Lambert who testified similarly and that he had seen Sanders put his arm around Goss and say something to him and that Goss became visibly upset. Jones and Sanders both denied the incident. I credit Goss and Lambert and I also find based on Sanders testimony and that of Jones that Sanders was a supervisor within the meaning of Section 2(11) of the Act. I also find that Goss was not a supervisor but was a rank-and-file employee. I, thus, find that Jones' statement was a threat of the futility of the employees' support for the Union and that Sander's statement was a threat of discharge made to Goss because of his support of the Union and that Respondent violated Section 8(a)(1) of the Act in each instance.

Goss testified further that about the middle of September there was a discussion during a lunch or break period in the port building with Jones, Goss, employee Shane Arnold, and about four or five other employees. Arnold asked Goss when they were going to get a union. Goss testified that "Jones blew up saying there would not be a union here and that the owner would shut the doors and fire everybody." Arnold told "Jones not to get mad as he was just joking with him. Jones walked off." Jones denied making these comments. I credit Goss. I find that Jones' statements were a threat of futility, plant closure, and discharge if the employees supported the Union and were violative of Section 8(a)(1) of the Act.

Vaughn testified that Tim Barnes had come to work in the maintenance department on light duty a couple of weeks before Goss was discharged. Jones had brought Barnes into the maintenance shop and told Goss and Vaughn that Barnes had hurt his shoulder and would be on light duty and could keep the tools straight or help check tools in and out and keep the floor swept.

Vaughn testified that at the end of September, he heard Yard Foreman (Shipping/Receiving Foreman) Sanders talk about the Union outside the plant at the end of the pad by a portable air-compressor and something came up about the Union and Sanders put his hand on Goss' back and said, "[I]f the Union come in, that they'd get fired, or they'd shut the doors." Although Respondent denied in its answer that Sanders was a supervisor,

the unrebutted testimony of Sanders, himself, establishes that he was the shipping/receiving material foreman until June or July 2002, when he chose to go back to the yard as a material handler. During the period of his supervisory authority, he supervised the material handlers and coordinated what was delivered to the shops, scheduled barges, ordered that they he pulled from the fleet, watched them being loaded, took photographs of them, called the Memphis office if there were any problems, and shortages and answered to Plant Manager Jones. If there were any wrong parts, Sanders would reorder them through Memphis. Sanders considered himself a supervisor. He on occasion permitted employees to leave early. I find at all material times herein Sanders was a 2(11) supervisor and an agent of Respondent under Section 2(13) of the Act.

At the hearing, Sanders conceded that he and Goss had a conversation in August and September 2001, but that he did not recall ever telling Goss any words to the effect that if a union came in, he (Goss) would be the first one fired. He testified that on one occasion as a result of rumors that he (Sanders) had heard, he asked Goss out of curiosity and said, "[W]hy—I couldn't understand why, in his position, because I had told him that, you know even had they got a union in, it wouldn't affect us in any way" because both he and Goss were foremen and "therefore we couldn't join the Union even if it had of come in."

About mid- to late-September with the encouragement of other employees Goss and Vaughn initiated contacts with Unions about representation for the employees. Goss contacted the Steelworkers and the Boilermakers. Vaughn spoke with a Steelworkers representative. Goss and Vaughn with encouragement from the Unions decided to collect names of employees who were interested. Over a 2-day period Vaughn went around the plant before and after work and during lunch and asked the employees if they were interested and wrote the names of interested employees on a list. He solicited about 80 to 90 percent of the employees. Shop Foreman Dickey Harris was aware of this and told Vaughn that a worker from Memphis who was on temporary duty at the Iuka plant had inquired about this. Harris told Vaughn he had covered for him but that Vaughn should not let anyone else know what he was doing or the Memphis employee would contact Vice President Murray Creasy and that Vaughn would be fired. I credit Vaughn's testimony and find that Respondent violated Section 8(a)(1) by this threat although Harris denied having made the threat. Union International Representative and Organizer Barry Edwards testified he met with some of the Iuka employees including Goss in early October at Othas, a store near the Iuka plant, and gave them some union literature.

Goss testified that on October 3, when he reported to work at 6:30 a.m., Shop Foreman Adcock was in the maintenance shop and asked Goss if they were about to start a union. Goss replied "probably so." Adcock then said they would have to get Goss in management so he could not be involved. Adcock then walked Goss around the facility and pointed out purported problems such as tools left in an outside area and that the company truck window was down. Adcock then took Goss to his (Adcock's) office and informed him, he (Goss) would have to write up employees Vaughn and Barnes. When Goss asked the reason, Adcock told him it was because the tools were left out, the truck window was left down, and the maintenance shop door had not been closed. Goss told Adcock that these were not Vaughn's and Barnes' responsibility and Adcock told him it did not matter and handed Goss two writeup forms and directed Goss to fill them out. Goss had never seen one of these forms before. They then went back to the maintenance desk and Goss sat down. He told Adcock he did not want to do this and Adcock told him to fill out the forms. He asked Adcock what he should put on the forms and Adcock told him to put down lack of job performance. He did so and gave them to Adcock who rolled them up and left the office. Goss then went to Vaughn and Barnes and told them to come to the maintenance shop and shut the door and told them he had been directed by management to write them up and not to pay attention to it and that it meant nothing and that "it was because we was trying to get union organizing going." About 8 a.m., Adcock called to Goss and told him to bring Vaughn in and he took Vaughn to Adcock's office where Adcock was sitting. Adcock told Vaughn to sit down and slid the writeup to Vaughn and asked whether Vaughn had looked at it and understood and Vaughn said yes. Adcock then told him to sign it and told him he could leave and to send Barnes in. Adcock then did the same thing with Barnes. Goss testified that the persons responsible for the tools that had been left out were whoever checked them out and that those tools had been checked out, and that the truck window was the responsibility of whoever had last used the truck. Goss testified that from the start until his termination, either Jones or a supervisor would secure the building and that he (Goss) had never secured the building. Goss testified further that on the day prior to the issuance of discipline to Vaughn and Barnes, there were approximately 10 fitters working over and that Adcock was staying over when he (Goss) left for the day. After Vaughn and Barnes left Adcock's office, Adcock told Goss he needed to speak to him and showed him another writeup form and told Goss that Jones had told him to give it to Goss, but since Goss had written Vaughn and Barnes up, he would not have to give it to Goss. Goss testified that about 1:30 p.m. that day, Adcock told him he needed to see him in Jones' office. Jones and Adcock were in the office and told him to sit down. Jones then slid a paper to him which was a termination form for his discharge. When Goss asked what it was for, Jones said he had no idea. Goss asked what was going on and Jones said he did not know but that Jack Melvin, Respondent's general counsel and human resource director, had hold him to terminate Goss immediately. Jones told Goss to give him a few days and he would talk to Vice President Murray Creasy and he would talk to Melvin to find out what was going on. Jones told Goss he could not do without him. Jones told Goss to get his personal tools and walked Goss out to his vehicle. Goss asked Jones if it was about the Union and Jones said he did not know and asked, "[B]ut why do they want a union?" Goss testified he also asked Adcock the reason for his discharge and Adcock said he did not know. At the hearing, Jones acknowledged having told Goss that Melvin had ordered his discharge and also acknowledged a telephone call from Goss to him on October 4, the day after the discharge and a telephone call he received from Goss on October 8, which Goss

had taped. In that phone call Jones again said he did not know why Melvin had called him and told him to fire Goss immediately, Jones also said he had no idea and that this was the first time this had ever happened to him (Jones). Jones again said he would talk to Creasy who was in Chicago at the time and also told Goss he could call Melvin. At the hearing, Jones contended he had discharged Goss for poor job performance but acknowledged having made the statements as set out above in order not to have to deal with Goss on the telephone which he said was one of many calls he received from Goss and that he told Goss anything just to get him off the phone.

Former employee Jesse Lambert, who was discharged by Respondent, testified that shortly after Goss was terminated he heard Mark Jones tell someone that "the last thing this place needs is a union, and if the union comes they would shut the doors and go back to Memphis." Lambert testified he turned and saw Jones.

On October 10 or 11, Goss contacted Vaughn and they agreed to have a meeting for employees at the local restaurant a short distance from the plant to bring the employees up to date on the status of the organizing effort and to distribute union literature. Vaughn contacted 25 to 30 employees and informed them of the meeting which was held during lunch at the local restaurant on October 11. International Representative and Organizer Barry Edwards handbilled at the gate for about an hour. Vice President Murray Creasy was at the facility on that day. The handbilling was witnessed by Respondent's management.

Vaughn drove the company truck to the diner for the union meeting. This truck is normally used by maintenance to go from building to building at the plant sites by maintenance in the course of repairs. Vaughn drove Barnes and employee Matt McGee to the meeting with Goss and the other employees. There were approximately 25 employees at the meeting. During the course of the meeting, Jones and Sanders arrived at the diner in Jones' maroon company truck. Sanders went inside and looked around and left. Jones stayed in the truck. Vaughn, Barnes, and McGee were late returning from the meeting. When employee Jesse Lambert returned he observed Sanders parked in Jones' truck on the road to the plant. When Vaughn, Barnes, and McGee returned, Jones was standing outside as they drove through the gate. Vaughn went back to work in the maintenance shop and was called to Jones' office where Jones and Adcock were waiting. Adcock pointed to a paper on Jones' desk and told Vaughn to read it. It said Vaughn was discharged for taking the company truck off the premises. Adcock had Vaughn sign it and had Vaughn get his tools. Vaughn told Adcock he did not understand this and Adcock said several times that he had nothing to do with it. Neither Barnes nor McGee who had ridden in the truck with Vaughn were disciplined. There is a rule in the Company's handbook providing for the discharge of employees who use company vehicles for personal use. This rule has apparently never been enforced and employees have driven company vehicles off of the premises for a variety of reasons including the regular use of the company vehicles to go to lunch at nearby restaurants. Vaughn testified he and Goss had regularly used the company truck assigned to maintenance to go to lunch and other employees had ridden with them. This testimony was corroborated by former employees Christopher Bo Johnson and Wesley Watson.

Jones and Sanders testified they had gone to the diner to check where the company truck was and not to observe who the employees were meeting with. I do not credit this testimony. I find that Respondent had learned of the upcoming lunch meeting to discuss the Union and was observing who was there in support of the Union. I find Sanders was later parked by the road for entrance to the plant to observe the employees who returned from the meeting. I find Respondent was engaged in surveillance of its employees' union activities and, thus, violated Section 8(a)(1) of the Act.

On October 15, Goss and Vaughn returned to the Iuka facility wearing union organizing buttons and met secretary Glenda Basham in the reception area. The evidence does not support a finding that Basham was a supervisory employee or an agent of Respondent. Goss tape recorded the visit. Goss asked Basham whether Jones had talked to Creasy. Basham asked, "[A]bout bring you back?" Goss said yes and Basham said, "[N]ot with those stickers on" in reference to the union buttons. She then told Goss the Company did not want a union. General Counsel and Human Resources Director Jack Melvin then emerged from a nearby office area where he had been listening and told Goss he could not discuss the Union on the property and told Goss and Vaughn to leave which they did after a brief exchange. I find that Respondent violated Section 8(a)(1) of the Act by Melvin's failure to disavow Basham's statement that Goss and Vaughn would not be returning to work because of their engagement in union activities. *Selkirk Metalbestos*, 321 NLRB 321 NLRB 44 (1996), citing *Highland Yarn Mills,* 313 NLRB 193, 207 (1993).

Analysis

The Discipline and Discharge of Employees Eddie Goss and Dee Vaughn and the Discipline of Tim Barnes

On October 3, the Respondent discharged employee Eddie Goss for alleged lack of work performance. Dee Vaughn was discharged by Respondent for driving a company truck off the premises on October 11. The General Counsel and the Charging Party contend that Goss and Vaughn were discharged because of their engagement in protected concerted activities in their role of initiating the commencement of the union campaign among Respondent's employees at the Iuka, Mississippi plant. The General Counsel and the Charging Party rely on Respondent's violations of Section 8(a)(1) by its unlawful interrogation of employees concerning the Union, threats of plant closure, loss of jobs if the Union were to be successful in its organizational campaign, its engagement in unlawful surveillance and its identification of Goss and Vaughn as the leading union supporters. They contend that the testimony of Goss and Vaughn should be credited over the testimony of Respondent's witnesses including Jones and Adcock who carried out the discharges of Goss and Vaughn as well as the testimony of Melvin, Sanders, and Creasy. Respondent contends that the discharges of both employees were lawful as they were supervisors under the Act and were not entitled to the protection of the Act accorded to rank-and-file employees who may join and

support a labor organization. They further contend that Goss was disciplined and discharged for lack of performance and Vaughn for driving a company truck off the premises and that Vaughn and Barnes were issued a disciplinary warning for lack of performance.

I find that the General Counsel has established prima facie cases of violations of Section 8(a)(1) and (3) of the Act by Respondent's discipline and discharge of these two employees and the discipline of Barnes. Initially, I credit the specific and detailed testimony of Goss and Vaughn over that of the Respondent's witnesses which was vague, conclusionary, and inconsistent. I find that the Respondent had knowledge that Goss and Vaughn were union supporters and had animus against the Union and its supporters as evidenced by the 8(a)(1) violations of the Act found in this decision including unlawful interrogation and threats of plant closure and the loss of jobs by employees if they chose union representation. I find that the coercion of Goss by Adcock to issue written warnings to Barnes and Vaughn was a subterfuge by Respondent to bolster its contention that Goss was a supervisor who was not protected by the Act. I find the contention that Goss and Vaughn were supervisors is also a subterfuge to deny both employees the protection of the Act. I further find that the General Counsel has established that the discipline and discharge of Goss and Vaughn and the discipline of Vaughn and Barnes by the Respondent were motivated by the antiunion animus of the Respondent. In this case all of the elements of a finding that the discharge was unlawfully motivated are present. The Employer had knowledge of the employees' support of the Union, had animus against the Union and its supporters and took adverse actions against the employees by disciplining and discharging them. The specific threats against these employees as well as the timing of the discharges and the disparate treatment of these employees clearly established the nexus between the unlawful motive and the discipline and discharges of these employees. Moreover the subterfuge engaged in by the employer to support its defense that the employees were supervisors clearly shows that Respondent's discharge of these employees was pretextual. I accordingly find that the General Counsel has established that the discipline and discharge of Goss and Vaughn and the discipline of Barnes was pretextual and violative of the Act. Assuming arguendo that the discharges and disciplines were not pretextual, I find that the Respondent has failed to rebut the prima facie case by the preponderance of this evidence as I find Respondent has not demonstrated that it would have disciplined and discharged Goss and Vaughn and disciplined Barnes in the absence of the unlawful motive. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *WXGT, Inc.*, 330 NLRB 695 (2000). I find no merit to Respondent's contention that Goss and Vaughn were supervisors under Section 2(11) of the Act. I credit the testimony of Goss and Vaughn concerning their job duties over that of the Respondent's witnesses whose testimony I find unreliable. I specifically credit the clear, detailed, and specific testimony of Goss concerning Adcock's inquiry whether there was going to be a Union and upon being informed by Goss in the affirmative, telling Goss they (Respondent's management) would have to make him a supervisor and then coercing Goss to sign a disciplinary form against Barnes and Vaughn for a contrived reason which was an 8(a)(1) and (3) unfair labor practice and its subsequent discharge of Goss for lack of work performance on the same day to be a subterfuge designed to deny Goss the protection of the Act. Respondent has failed to establish that Goss and Vaughn were supervisors under Section 2(11) of the Act. The evidence in this case is devoid of the indicia of supervisory status of these employees with the sole exception of the subterfuge engaged in by Respondent when it coerced Goss into filling in the discipline form presented to Vaughn and Barnes by Adcock in the presence of Goss.

I find that Respondent violated Section 8(a)(1) and (3) of the Act by its discipline and discharge of Goss and Vaughn and by its issuance of the warnings to Vaughn and Barnes and the placement of a warning letter in Goss' personnel file.

The Millington (Memphis) Facility

On December 5, Union Representatives Barry Edwards and Kyle Evenson handbilled the employees at the Memphis facility. Respondent's general counsel and human resources director, Jack Melvin, approached and told them they were on company property. The union representatives contended they were on the public right of way outside the gate of Respondent's property. When the representatives told Melvin that the employees at the Memphis facility might want a union, Melvin said, "I'll tell you what; that'll be day they throw dirt over the top of both you and me; it'll be the day that happens." He also told them in reference to the Iuka facility, "y'all did a good job in Iuka on our plant; I appreciate that" and that "you suckers failed miserably." This was in reference to the Iuka plant where Goss and Vaughn had been unlawfully discharged and Vaughn and Barnes had been unlawfully issued a disciplinary warning and where numerous 8(a)(1) violations had been committed in response to the union campaign at the Iuka facility.

I find that Melvin's comments to Edwards and Evenson were unlawful threats of the futility of the Union's efforts to organize the employees in violation of Section 8(a)(1) of the Act. *Montgomery Ward & Co.*, 316 NLRB 1248, 1249 (1995), and conclusive evidence of Respondent's animus against the Union.

The Refusal to Hire and Consider for Hire

On November 2, a Friday, Organizer Barry Edwards saw an advertisement by Respondent in a Memphis newspaper for welders and structural fitters. On November 5, the following Monday, he telephoned Respondent's Memphis facility about the advertisement. A woman, the receptionist Rhonda Duffin, answered the telephone. Edwards told her he was a welder looking for work. She inquired about his experience and he told her he had 30 years of experience in welding, rigging, and fitting. He asked her whether he needed an application or whether a resume would suffice. She told him to bring in his resume. He then contacted two unemployed members of the Memphis local, Ronald Fuqua and Jeff Pearson. Fuqua had about 15 years' experience as a welder and fitter. Pearson had 2 years' experience in the boilermaking field and 5 years of welding experience. All three employees Fuqua, Pearson, and

Edwards filled out resumes and Edwards took them to Respondent's facility on that date. The resumes identified each of them as organizers. Edwards handed them to Respondent's president, Harold Trusty. Edwards testified he told Trusty he was a welder rigger and fitter and had over 30 years' experience. Edwards told Trusty he also had resumes of two others and asked if he needed an application. Edwards testified that Trusty said the resumes would suffice. Trusty told Edwards he would see they got to the right person and if they had the right talents, Respondent would contact them. The following day Trusty gave the resumes to Human Resources Director Melvin. According to Trusty, he had told Edwards that it was past closing time and he must come in the next day to fill out an application and take a welding test and that Edwards seemed in a hurry and left the resumes on the counter. I credit Edwards' version of this conversation. None of the three applicants were ever contacted by the Respondent.

Respondent contends in reliance on the testimony of its General Counsel and Human Resources Director Jack Melvin, that Melvin required an application of each employee who was hired. Melvin testified that the application must be completed except to the extent that an attached resume sets out the names of prior employment and the experience of the applicant. Although they were subpoenaed by the General Counsel in this case, the resumes of Edwards, Fuqua, and Pearson were not produced at the hearing and Melvin testified they must have been thrown away "in the process." In crediting Edwards' testimony over that of Trusty, I find it unlikely that Edwards would have taken the time and effort to have completed the resumes and delivered them to the Respondent and then failed to appear for a welder's test and to fill out an application if Trusty had informed him that this was necessary. I note also Melvin's testimony that he weld tests every applicant for employment as a welder and fitter that walks in the door even if he has no immediate openings and is not hiring in order to have available a stack of applications of applicants who have been weld tested and from which he elects to contact them in reverse order to call the most recent applicants first as they are the most likely to have not yet found a job. However, union member and applicant Tony Churchill applied for work on December 5, wearing a union shirt. Melvin told him he was not hiring and did not ask what his experience was or what type of job he was seeking and did not offer to weld test him or offer him an application. Melvin testified he did not hire during the month of December. He also testified that he weld tests every applicant who walks in the door even if he is not hiring.

It is uncontroverted that Respondent hired other employees as welders and fitters after the submission of the resumes by Edwards and that the individuals hired had considerably less experience than Edwards, Fuqua, and Pearson and Churchill who was rebuffed in his attempt to apply for work. Thus, Respondent deviated from its stated policy of weld testing employees and taking their applications even if it was not then currently hiring. Melvin testified that he does not hire employees in December because of a slowdown in business. However, its records show that Respondent hired laborers in December.

Analysis

I find that the General Counsel has made a prima facie case that the Respondent refused to hire and refused to consider Edwards, Pearson, Fuqua, and Churchill because of its determination that they were union supporters whom it regarded as a threat to unionize its facility. In *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir 2002), the Board set out the elements for an unlawful refusal to hire and unlawful refusal to consider cases. The Board held at 12:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 215 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminates would have been hired but for the discrimination against them must be litigated at the hearing on the merits.
>
> If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminates immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them.

Once the prima facie case has been established, the burden shifts to the respondent to demonstrate that it would not have hired the applicants even in the absence of the union activity or application. This framework appropriately allocates the burdens set forth in *Wright Line*, supra.

The evidence in this case demonstrates that Respondent was hiring at the time Edwards, Pearson, Fuqua, and Churchill applied. It advertised for welders and fitters and hired at least six individuals on or after November 5, when Edwards turned in his own resume and that of Fuqua and Pearson and also hired

other individuals as laborers in December. Edwards, Pearson, Fuqua, and Churchill were qualified for the positions of welders and structural fitters advertised by Respondent. Edwards had 34 years' experience as a welder and fitter. Fuqua had 15 years' experience as a welder and fitter and is qualified in the welding of structural steel. Pearson had 5 years' experience including welding structural steel. Churchill had 19 years' experience as a welder and 12 years' experience as a fitter. Edwards, Fuqua, and Pearson all indicated on their resumes that they were union members seeking to organize Dynasteel. Churchill wore union insignia when he attempted to apply at the Memphis facility. The evidence in this case regarding the discharges of Goss and Vaughn and the numerous 8(a)(1) violations demonstrate that Respondent had antiunion animus and would act on it to thwart the Union's organizational campaign. Churchill, who wore union insignia, was immediately rebuffed by Melvin without an opportunity to take a welding test or to fill out an application. Edwards who was not wearing any union insignia at the time he told Trusty he was applying for work was asked by Trusty whether he was a welder.

Animus may also be inferred in this case by a comparison of the significantly greater experience of Edwards with 34 years' experience, Pearson with 15 years' experience, Fuqua with 5 years' experience, and Churchill with 19 years' experience as contrasted with the limited experience of the applicants who were hired, namely Mark Darnell who applied on November 5 and was hired on November 6, with 2 years' experience as a welder, Donald Lee who submitted a resume and applied on November 13, and was hired on November 14, with 5 years' welding experience, Christopher Levy who applied on November 5, and was hired with 3 years' welding and fitting experience, Brian Pruitt who applied on October 31, and was hired on November 5, with a little over a year experience as a fitter, Ken Blair who applied on November 6, and was hired on November 11, with no application in the record, Brian McGowan who applied on November 9, and was hired as a fitter on November 13, with no application in the record.

In *FES,* supra, the Board established a two-part test for determining whether an employer has failed to consider applicants based on their union affiliation.

> To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.
>
> If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established. The appropriate remedy for such a violation is a cease-and-desist order; an order to place the discriminates in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminates, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions.

Dynasteel was hiring during November and December 2001. It hired six welders in November and laborers in December. The evidence demonstrated that Dynasteel refused to consider Tony Churchill who attempted to apply for work on December 5, but who was not permitted to fill out an application or discuss his qualifications and interest in employment. He was not permitted to take a welding test in contrast to Melvin's testimony that he weld tests every applicant for a welding position that walks in the door, even if he is not hiring welders at the time. I do not credit Melvin's testimony that he never hires in December because of normal yearend slowdown in work. It is undisputed that Dynasteel hired three laborers in December. Churchill's undisputed testimony is that Melvin summarily dismissed him without even asking what position he was applying for. It is clear that Melvin saw the union insignia worn by Churchill and immediately excluded Churchill from the hiring process at Dynasteel, thus, depriving Churchill of the opportunity to be considered for one of the three laborer positions which Dynasteel later filled in December. Moreover, Churchill was also excluded from consideration of any other welder, fitter, or laborer positions that might be open in the future. *Colburn Electric Co.*, 334 NLRB 532 (2001), where a refusal to consider was found where employer refused to allow a union applicant to take a weld test.

While it is clear that Edwards, Fuqua, and Pearson were not hired because of their union affiliation, it is also clear that the Respondent refused to even consider them because of their union affiliation. As set out above with respect to the refusal-to-hire allegation, it is also clear that the animus of Respondent and the unlawful issuance of discipline and the two discharges support a finding that the refusal to consider Edwards, Fuqua, Pearson, and Churchill were motivated by Dynasteel's animus toward the Union and its supporters. The General Counsel's prima facie case has not been rebutted by the preponderance of the evidence.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Plant Manager Mark Jones' statement to employee Eddie Goss that Dynasteel was owned by a private individual who would "shut the doors and fire everybody before he'll let a union come in."

(b) Shop Foreman Glen Adcock's statement to employees that they (the Company) would shut Dynasteel down if the Union came in.

(c) Plant Manager Jones' statement to Goss that he had already told him there would be no union at the company facility.

(d) Shipping/Receiving Foreman Sanders' statement to Goss that if they (the employees) ever tried to start a union at Dynasteel he (Goss) would be the first one fired.

(e) Jones' statement to employees that there would not be a union at Dynasteel and that the owner would shut the doors and fire everybody.

(f) Sanders' statement to employees that if the Union came in, the employees would be fired or they would shut the doors.

(g) Shop Foreman Tony (Dickey) Harris' statement to employee Vaughn that if Vice President Murray Creasy was told Vaughn was soliciting names of union supporters, Vaughn would be fired.

(h) Adcock's interrogation of Goss whether they (the employees) were about to get a union started and his statement that they (management) would have to get Goss into management so he could not be involved.

(i) Jones inquiry of Goss after his discharge as to why the employees wanted a union.

(j) Jones' statement to an employee that the last thing the Company needs is a union and if the Union came in, they would shut the doors and go back to Memphis.

(k) The surveillance of the Company's union activities engaged in by Jones and Sanders.

(l) The failure of General Counsel and Human Resources Director Jack Melvin to disavow a statement made to Goss and Vaughn by Respondent's secretary Glenda Basham that Goss and Vaughn would not be returned to work with their union buttons on.

(m) The threat issued by Jack Melvin to union organizers Barry Edwards and Kyle Evenson that "they" would be throwing dirt over the top of you and me before there would be a union at the Company.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by:

(a) The issuance of the warnings to employees Dee Vaughn and Tim Barnes.

(b) The placement of a warning in Eddie Goss' personnel file.

(c) The discipline and discharge of employees Eddie Goss and Dee Vaughn.

(d) The failure to hire and to consider for hire employees Barry Edwards, Jeff Pearson, Ronald Fuqua, and Tony Churchill.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the Respondent has engaged in the above violations of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies and purposes of the Act and post the appropriate notice. It is recommended that Respondent rescind the unlawful warnings issued to employees Dee Vaughn and Tim Barnes and the unlawful warning placed in employee Eddie Goss' personnel file and rescind the unlawful discharges of employees Goss and Barnes and offer immediate reinstatement to Goss and Barnes. The employees shall be reinstated to their prior positions or to substantially equivalent ones if their prior positions no longer exist. The employees shall be made whole for all loss of backpay and benefits sustained by them as a result of Respondent's unfair labor practices. It is recommended that Barry Edwards, Jeff Pearson, Ronald Fuqua, and Tony Churchill be instated to the positions for which they applied or to substantially equivalent ones if these positions no longer exist and that these applicants shall be made whole for any loss of backpay and benefits sustained by them as a result of Respondent's unfair labor practices.

These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[Recommended Order omitted from publication.]